SYARIKAT PERTANIAN EMMAL SDN BHD A

v.

TRACTORS MALAYSIA [1982] SDN BHD

HIGH COURT SABAH & SARAWAK, SANDAKAN B
YEW JEN KIE JC
[CIVIL SUIT NO: S22-03-2005]
4 JUNE 2009

CONTRACT: *Specific performance - Sale and purchase of land - Defendant vendor rejected plaintiff's offer to purchase after earlier accepting offer and requesting for earnest deposit and letter of intent - Whether a binding contract had concluded upon defendant's earlier acceptance - Whether plaintiff entitled to specific performance* C

The defendant placed an advertisement *via* its agent for offers to purchase its three parcels of land ('the lands'). The plaintiff offered to buy the lands at RM1.6 million in a letter dated 18 August 2004 which was accepted by the defendant in a letter dated 7 October 2004. The defendant also requested from the plaintiff a 5% earnest deposit and a letter of intent, a draft of which was annexed with terms and conditions. The plaintiff accordingly issued a letter dated 11 October 2004 containing almost all the terms and conditions as stated in the draft letter of intent except for cl. 4 to which some amendments were made. A cheque for the sum of RM80 thousand was also enclosed as payment for the 5% earnest deposit. A month later, the defendant *via* its agent rejected the plaintiff's letter of 11 October 2004 and returned the plaintiff's cheque. Dissatisfied, the plaintiff now sought for specific performance. The main issue was whether a binding contract had already concluded between the parties when the defendant, in its letter of 7 October 2004, accepted the plaintiff's offer. D E F G

Held (ordering specific performance):

(1) The clear and unambiguous words in the defendant's letter of 7 October 2004 *via* its agent that "We are pleased to inform you that the registered owner, Tractor Malaysia [1982] Sdn Bhd had accepted your offer of RM1,600,000 for the purchase of the above properties" would be taken to mean that the defendant accepted the offer in the plaintiff's letter dated 18 August 2004 and that it intended to enter into a contract of sale with the plaintiff. The next paragraph of 7 October 2004 H I

letter read "other terms and conditions as per the draft letter of intent". It did not say that the acceptance was subject to other terms and conditions as per the draft letter of intent or subject to any other conditions. Therefore, the question was whether the plaintiff conceived that the acceptance in the preceding paragraph of the said letter was in fact subject to the plaintiff issuing a letter of intent containing the terms and conditions as per the draft letter of intent annexed. Such an inference could not be drawn for in doing so would go against the policy of the court, namely, "the law leans in favour of upholding bargains and not in striking them down willy-nilly" (per Gopal Sri Ram JCA as he then was in *Charles Grenier Sdn Bhd v. Lau Wing Hong*). (paras 29, 30, 31 & 32)

(2) A condition precedent for making the existence of a binding contract must be expressly shown. A careful perusal of the defendant's letter of 7 October 2004 showed no mention that the acceptance was "subject to" those terms or any other terms or conditions. That clearly indicated that the acceptance was an unconditional acceptance. (para 33 & 34)

(3) The seriousness of forming a contract was also evidenced by the payment of the earnest deposit by the plaintiffs. In *Damon Cia Naviera SA v. Hapag-Lloyd International SA*, it was held that the provision for payment of a deposit was a term of the contract and that in the absence of a special provision it did not carry with it any implication that it was a condition precedent to the existence of contractual relations. (para 35)

(4) The subsequent conduct of the parties clearly revealed that both parties had intention to enter a binding agreement. (para 36)

(5) The request for the letter of intent was superfluous and should be regarded as a mere formality. For a binding contract to be formed, only one offer and one acceptance was needed. There was no need for multiple or repeated offers and multiple or repeated acceptances. Once an offer was made, it need not be "confirmed", "approved" or "made formal" and the same went for acceptance. (para 43)

(6) As there was already an unconditional acceptance of the plaintiff's offer in its 18 August 2004 letter, the parties could not be said to be negotiating prior to the issuance of the plaintiff's letter of 11 October 2004. (para 44)

(7) The amendment to cl. 4 was not a counter-offer which gave the defendant an option whether to accept or to make a further counter-offer. The amendment to cl. 4 did not change the fact that there was already a concluded and binding contract formed between the parties. (para 45)

(8) The defendant's letter of 7 October 2004 did not contain a qualifying condition that the acceptance was subject to the terms and conditions of the draft letter of intent annexed. The binding contract was not subject to cls. 4, 8 and 9 of the plaintiff's letter of 11 October 2004. The construction of the three said clauses did not negate the fact that a concluded agreement was already reached between the parties. (paras 53 & 54)

(9) The authorities referred to indicate that even where the phrase "subject to contract" was used, the law did not regard the execution of a formal agreement critical for the existence of a contract but a mere formality which did not affect the parties' legal obligations. As no such phrase was used in the defendant's letter of 7 October 2004, all the more the reference to the execution of a formal sale and purchase agreement was a mere formality to a binding contract which was already formed. (para 69)

(10) The subsequent sale of the lands to one Chin Kui Foh for RM1.9 million showed that the defendant locked up the plaintiff's offer whilst hunting for a better bargain. When it found a purchaser willing to pay RM300 thousand more, it relied on the plaintiff's letter of intent to get out of its legal obligation under the concluded contract. Given that all the terms which it sought to rely on were drafted by the defendant itself, it would be unconscionable, unfair and inequitable for the defendant to first induce the plaintiff to write out the letter of intent, obey the terms dictated by it therein thereby giving the plaintiff an impression or belief that it agreed to a binding contract, and then turn around to use that very letter of intent to work against the plaintiff. (paras 79 & 80)

(11) The plaintiff sought specific performance of the contract to sell the lands at RM1.6 million. The plaintiff's willingness and ability to perform the contract was unchallenged by the defence. Its evidence that the lands were uniquely valuable

due to their proximity to the land of the plaintiff's sister company also went unchallenged. As such, specific performance was an appropriate order. (paras 82 & 83)

Case(s) referred to:
Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] 1 LNS 3 PC ***(refd)***
Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***
Bonnewell v. Jenkins [1878] 8 Ch D 70 ***(refd)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Crossly v. Maycock [1874] 43 LJ Ch 379 ***(refd)***
Damon Cia Naviera SA v. Hapag-Lloyd International SA [1985] 1 All ER 475 ***(refd)***
Lau Sieng Nguong v. Hap Shing Co Ltd [1969] 1 LNS 80 FC ***(refd)***
Lim Chia Min v. Chean Sang Ngeow & Another [1997] 2 CLJ 337 FC ***(refd)***
Patridge v. CrIf ittenden [1968] 1 All ER 421 ***(refd)***

Legislation referred to:
Specific Relief Act 1950, s. 11(1)(c), (2)

For the plaintiff - Chen Kok On; M/s Peter Lo & Co
For the defendant - Datuk John Sikayun; M/s Luping & Co
Alex Decena (Lau Cheung Hoon with him); M/s Jayasuriya Kah & Co

Reported by Usha Thiagarajah

JUDGMENT

Yew Jen Kie JC:

[1] The defendants had three parcels of land (the Lands) held under namely, CL 075413937, CL 075413964 and CL 075413973 which they wanted to sell and they engaged WTW Real Estate Sdn. Bhd. ("WTW") to place an advertisement in the Borneo Post inviting interested parties to make offers to purchase the Lands. The plaintiffs were most keen to buy the Lands as they are situated in the vicinity of their sister company. They offered to buy the Lands at RM1,600,000 free of encumbrances (*vide* of their letter dated 18 August 2004).

[2] After much anxious waiting and enquiry on the outcome to their offer, the plaintiffs received a letter dated 7 October 2004 from CH Williams Tahar & Wong (Sabah) Sdn Bhd ("CHW") informing that the defendants had accepted the plaintiffs' offer and requested for 5% of earnest deposit to be paid together with a letter

of intent from the plaintiffs. The letter also said that other terms and conditions were as stated in the draft letter of intent annexed to it.

[3] The plaintiffs accordingly issued the letter dated 11 October 2004 containing almost all the terms and conditions as stated in the draft letter of intent except for cl. 4 to which some amendments were made. An Alliance Bank cheque for the sum of RM80,000 being payment of 5% earnest deposit was also enclosed.

[4] About a month later CHW wrote to inform the plaintiffs that the defendants had rejected their offer in its letter dated 11 October 2004 and returned the plaintiffs' cheque.

[5] It is the case for the plaintiffs that a binding contract had been formed when the defendants accepted the plaintiffs' offer in the letter dated 7 October 2004. Hence the plaintiffs now seek performance of that agreement.

[6] The defendants contend otherwise saying that the acceptance of the plaintiffs' offer was subject to two conditions, namely, payment of 5% earnest deposit and the terms and conditions contained in the draft letter of intent which had yet to be settled between the parties. The resulting contract is "stillborn" when the defendants failed to take up the counter-offer proposed by the plaintiffs in their letter of intent dated 11 October 2004.

Issues

[7] The parties were unable to agree to the issues to be tried and the issues shall be governed by the pleadings. The court has identified the following issues:

a. Was there a binding agreement between the plaintiffs and the defendants? Related to this issue is whether the acceptance of the offer by CHW's a conditional or unconditional acceptance?

b. Were the parties still negotiating prior to the plaintiffs' letter of intent dated 11 October 2004?

c. If there was a binding contract between the parties, whether the contract was subject to the conditions precedent set out in cls. 4, 8 and 9 in the plaintiffs' letter dated 11 October 2004.

d. Whether the plaintiffs' letter dated 11 October 2004 constitutes an offer to purchase the Lands subject to the terms and conditions set out in cls. 4, 8 and 9 of the plaintiffs' letter dated 11 October 2004?

A e. If the plaintiffs' letter dated 11 October 2004 constitutes an offer to the defendants, was such offer accepted by the defendants?

Findings Of The Court

B *Issue A – Whether There Is A Binding Contract*

[8] It is unarguable that the advertisement in the Borneo Post is merely an invitation to interested parties to make an offer for the purchase of the Land. (See *Patridge v. CrIf ittenden* [1968] 1 All ER C 421 at 424).

[9] Although the plaintiffs' offer in the letter dated 18 August 2004 was addressed to WTW and the defendants were not named in the letter, since WTW was the agent engaged by the defendants to handle the sale of the Lands, the letter which was addressed to D WTW was as good as it had been directed to the defendants. The price offered was clearly stated as RM1.6 million.

[10] It is established fact that the defendants received six bids of which only two wanted to buy all the three parcels of land. Only E these two bids were seriously considered by the defendants. They were the plaintiffs and one Chin Kui Foh. The defendants admitted that they had already received the bids by Chin Kui Foh at the time the letter dated 7 October 2004 was issued.

[11] The letter dated 7 October 2004 reads:

F

> ... we are pleased to inform you that the registered owner, Tractors Malaysia [1982] Sdn. Bhd. had accepted your offer of RM1,600,000.00 for the purchase of the above properties.
>
> Please make a five percent (5%) earnest deposit payable to Tractors G Malaysia [1982] Sdn. Bhd. together with a letter of intent from your company. The other terms and conditions are as stated in the attached draft letter of intent.

[12] PW1 gave evidence that even before he received the letter dated 7 October 2004, he had already been informed by DW4 Chin H Ket Chung of CHW that he was the successful bidder and to just wait for the letter. True enough, the letter arrived.

[13] PW2 testified that when DW4 delivered the letter dated 7 October 2004 he told her that all she needed to do was to set I out the terms and conditions in the draft letter of intents in the plaintiffs' letterhead and send it to the defendants. The plaintiffs did exactly that after making some amendment to cl. 4.

[14] DW4 admitted that the conversation with PW1 had taken place, but he was certain that he only told PW1 that the success of the plaintiffs' bid "was subject to further confirmation in writing". He tried to add to his witness statement by saying that he mentioned about the attached draft letter of intent to PW1. This, however, was never put to PW1 in cross-examination thereby depriving him of the opportunity to explain.

[15] However, DW1 was evasive when asked in cross-examination whether he agreed that the letter did not state that the offer was subject to the defendants' confirmation. (See Q/A 266, 268, 275, 276 NOP)

[16] The evasiveness and the non-committal answer of DW4 is to my mind probably due to the fact that DW4 was aware that the statement in 7 October letter which stated that the defendants had accepted the plaintiffs' offer of RM1,600,000 is inconsistent with what DW4 had allegedly told PW1 ie, that the offer was still subject to the defendants' confirmation.

[17] I am inclined to believe that DW4 had told PW2 that all that the plaintiffs need to do was for the plaintiffs to submit the letter of intent with their own letterhead and that DW4 did not tell either PW1 or PW2 that the acceptance was subject for further confirmation in writing. I say so because the letter dated 7 October 2004 does not say that the acceptance was subject to any confirmation or any conditions, hence the unlikelihood for DW4 to have said so.

[18] The plaintiffs after having done what DW4 told them, that is, to issue a letter of intent in their letterhead and send it to the defendants, PW1 instructed its solicitor Messrs Poon Hiew & Associates to prepare the draft sale and purchase agreement. According to PW3 Chin Shen Vui, conveyancing clerk with Poon Hiew & Associates, she contacted DW4 for the address of the defendants' solicitor who acted for the defendants in this deal, and she was given the address of the defendants' solicitor in Shah Alam. PW3 duly sent the draft sale and purchase agreement to the defendants' solicitor but had not heard from them thereafter despite several reminders.

[19] According to DW1 Hj Mohamad Bin Yusof, when the defendants sent the letter dated 7 October 2004, the terms and conditions of the agreement had not been finalized as the defendants had yet to see the plaintiffs' letter of intent, which could

include new proposed terms and conditions or variations to terms and conditions contained in the draft letter of intent. It was still subject to negotiations between the parties and the defendants would need to study the plaintiffs' offer carefully once they received it. (DW1's witness statement para. 8)

[20] For this reason, the defendants disagreed with the plaintiffs that the contract was formed when the defendants accepted the plaintiffs' offer to purchase *vide* the letter dated 7 October 2004 as envisaged in the case of *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625. The defendants contended that the Federal Court in *Charles Grenier* described the agreement between the plaintiffs and the defendants as an "open contract" because the parties to the transaction have been identified with sufficient clarity. So too the property, the price and the terms they considered essential. In the letter dated 7 October 2004 in this case, in addition to the parties, the price and the description of the property, the defendants had made acceptance of the contract subject to the payment of a 5% earnest deposit and other essential terms and conditions contained in the attached draft letter of intent.

[21] As such, the defendants contended that it falls within the principle under *Crossly v. Maycock* [1874] 43 LJ Ch 379 cited in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 SC in that there were several matters that remained to be settled between the parties.

[22] My understanding of the defendants' contention is that there was no formation of an open contract as envisaged by *Charles Grenier* as the essential terms of the agreement had yet to be settled and the parties were still at the negotiation stage.

[23] What is an open contract? In his work "*The Modern Law of Real Property*" 10th edn., the renowned writer Dr. Geoffrey Cheshire pens:

> If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain obligations implied by the law.
>
> (The above passage was referred to in *Charles Grenier*'s case).

[24] Is it essential that the terms of the agreement must be identified and agreed to in order to form an open contract? To answer this question, I find it helpful to refer to the following passage in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 which reads:

In *Cavallari (ibid)*, the High Court of Australia said this at p. 25:

> ... while the due course of completion of a contract for a sale of land is a matter of some complexity, involving the doing of a number of things by both parties, it is very well settled that an informal or 'open' contract not dealing expressly with any of these matters of detail, may be made and be binding. In such a case law and equity fill in the details, so to speak, providing by way of implication for whatever is necessary to effectuate due performance.

[25] Further, in *Charles Grenier*, Gopal Sri Ram JCA said thus, amongst others, with reference to "open contract":

> In order to give it effect, the law will, acting out of necessity (see, *Liverpool City Council v. Irwin* [1977] AC 239), imply terms into the contract for sale in order to make it work. See, *Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied a contract for the sale of land a covenant on the part of the vendor to do all things necessary to give effect to the agreement

[26] It can be seen from what has been said in the above authorities that the fact that the essential terms of the contract have yet to be discussed or "settled" will not preclude the formation of a open contract where the parties have intended the contract to come into existence.

[27] With this in mind, I proceed to determine whether there is a binding contract formed between parties by virtue of the letter dated 7 October 2004 and this will involve finding out whether there is *consensus ad idem*, or the meeting of the minds of the parties that a concluded contract was intended.

[28] What are the factors by which existence of an agreement may be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances and the object of the contract. (See: *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133). It is also necessary to look into the whole of the correspondence between the parties to see if they have come to a binding agreement. (See: *Lau Sieng Nguong v. Hap Shing Co Ltd* [1969] 1 LNS 80 FC). The true rule for construing an instrument is to consider what the writer must have conceived that the reader would understand from it. (See: *Bonnewell v. Jenkins* [1878] 8 CH D 70). It is for the court in each case to construe the correspondence exchanged between the parties

A and to say whether that is the result intended by the parties. If the court reaches a conclusion that the parties intended to form a concluded contract, then there is an enforceable contract. (See: *Charles Grenier*, *supra*).

B **[29]** Guided by the above authorities, the court asks what would PW1 understand when he reads the letter dated 7 October 2004? It is fair to say that when PW1 reads the clear and unambiguous words, "We are pleased to inform you that the registered owner, Tractor Malaysia [1982] Sdn. Bhd. had accepted your offer of RM1,600,000 for the purchase of the above properties", he would C conceive it to mean that the defendants had accepted his offer contained in the plaintiffs' letter dated 18 August 2004 and that they intended to enter into a contract of sale with the plaintiffs.

[30] The next paragraph of the letter dated 7 October 2004 reads D "other terms and conditions as per the draft letter of intend". It does not say that the acceptance is "subject to other terms and conditions as per the draft letter of intend" or subject to any other conditions.

[31] The court asked itself whether the plaintiffs, upon reading the E words "the letter of intent" and "Other terms and conditions as per the draft letter of intend ..." would have conceived that the acceptance stated in the preceding paragraph of the letter was in fact subject to the plaintiffs issuing a letter of intent containing the terms and conditions stated in the draft letter of intent attached to F the letter?

[32] The court is of the view that it cannot draw such an inference for in doing so, it would be going against the policy of the court, namely; "the law leans in favour of upholding bargains G and not in striking them down willy-nilly" (per Gopal Sri Ram in *Charles Grenier*, *supra*)

[33] In law, a condition precedent for making the existence of a binding contract must be expressly shown. (See: *Bonnewell v. Jenkins* [1878] 8 Ch D 70).

H

[34] A careful perusal of the letter dated 7 October 2004 shows that nowhere it had mentioned that the acceptance was "subject to" those terms or any other terms or conditions. This clearly indicates that the acceptance is an unconditional acceptance.

I

[35] The seriousness of forming a contract is also evidenced by the payment of the earnest deposit by the plaintiffs. In *Damon Cia Naviera SA v. Hapag-Lloyd International SA* [1985] 1 All ER 475, Fox LJ said, amongst other, thus, "I do not feel able to agree that in general, where the agreement provides for the payment of a deposit, such payment is necessarily a prerequisite to the formation of a contract ... The provision for the payment of a deposit is simply a term of the contract...In the absence of special provision it does not seem to me to carry with it any implication that it is a condition precedent to the existence of contractual relations ..."

[36] The subsequent conduct of the parties also clearly reveals that both parties have intention to enter into a binding agreement. The unchallenged evidence shows that PW1 soon after he had posted the letter dated 11 October 2004, instructed his solicitor to prepare a draft sale and purchase agreement for execution by the defendants. The conveyance clerk PW3 then issued a letter dated 13 October 2004 (DBD9) to CHW copied to the defendants requesting, amongst others, the address of the solicitors acted for the defendants in this Land deal and the next day, DW4 by fax supplied the details of the defendants' solicitor, TC Yong & KF Low in Petaling Jaya who handled the deal. DW4 confirmed that the information about the defendants' solicitor in Selangor was provided by the defendants themselves to CHW (NOP Q238) and that the defendants had at least consented to the release of that information to the plaintiffs' solicitor (NOP Q239). It should be noted that the information was also supplied after the defendants had received Chin Kui Foh's offer.

[37] To my mind, if the defendants had no intention to form an agreement with the plaintiffs at the time CHW issued the letter dated 7 October 2004 to the plaintiffs because they were still at negotiation stage, when the plaintiffs so eagerly prepared the draft sale and purchase agreement and asked for details of the defendants's solicitor who handled the deal, it is reasonable to expect the defendants and their agent to tell the plaintiffs to hold the gun, so to speak, because the deal was still at the negotiation stage and that the acceptance was "conditional". The defendants did not do that, instead it consented to CHW to release the information of its solicitor to the plaintiffs' solicitors.

[38] It is partly because of DW4's conduct in releasing the information to PW4 upon her request that I found that DW4 could not have informed PW2 or PW1 that the defendants' acceptance was "subject to written confirmation". As I had said before, if the

acceptance was conditional and if the parties were still negotiating, the defendants would not have permitted DW4 to release the information on their solicitor in this deal. Also, DW4 could and would have easily told the plaintiff not to rush into preparing the draft sale and purchase agreement as it would be a waste of time as the parties were still negotiating and the defendants had yet to give their confirmation in writing.

[39] Having regards to what DW4 had told PW2, that is, all the plaintiffs had to do was to send a letter of intent on the plaintiffs' letterhead; supplying the information of the defendant's solicitors to the plaintiffs' solicitors, coupled with the unconditional acceptance of the plaintiffs' offer, I found that the parties have intended that there should be a binding agreement between them and indeed an open contract had been formed as the parties to the transaction; the price and the property as well as the essential terms are all sufficiently identified.

[40] For the reasons stated above, my answer to issue one is in the affirmative for the plaintiffs.

Issues B – Whether The Parties Were Still In Negotiation Prior To The Issuance Of Plaintiffs' Letter Dated 11 October 2004

[41] It is the defendants' contention the fact that the parties were still negotiating, is clearly evidenced by the plaintiffs' amendment to cl. 4 of the plaintiffs' letter of intent dated 11 October 2004. The plaintiffs' amendment of cl. 4 in fresh wordings which, in the plaintiffs' view, was more favourable to the plaintiffs constitutes a counter-offer, and the defendants had an option either to decline or to make another counter-offer. However, the defendants subsequently declined the plaintiffs' counter offer.

[42] DW1 testified that the defendants intended the plaintiffs to make a formal offer to the defendants by way of a letter of intent, which contained proposed terms and conditions to be agreed between the parties (DW1 witness statement para. 7).

[43] In my opinion, the request for the letter of intent is superfluous and therefore should be regarded as a mere formality. As learned counsel for the plaintiffs had rightly submitted that for a binding contract to be formed, we need only one offer and one acceptance. In other words, we do not need multiple or repeated offers and multiple or repeated acceptance. Once an offer has been made, it does not need to be "confirmed", or "approved" or "made formal", and the same goes for acceptance.

[44] As there was already an unconditional acceptance of the plaintiffs' offer contained in the plaintiffs' letter dated 18 August, 2004, I am unable to agree that the parties were still at negotiation stage prior to the issuance of the letter dated 11 October 2004.

[45] I am unable to agree that the amendment to cl. 4 is a counter-offer which gives the defendants an option whether to accept it or to make further counter-offers. To my mind, this amendment to cl. 4 does not change the fact that there was already a concluded and binding contract formed between the parties.

[46] Based on the reasons aforesaid, my answer to issue (b) is in the negative for the defendants.

Issue (C) – If There Is A Binding Contract, Whether The Contract Is Subject To The Terms And Conditions Set Out In cls. 4, 8 And 9 Of The Plaintiffs' Letter Dated 11 October 2004

[47] For the defendants, it is submitted that the plaintiffs' letter of intent dated 11 October 2004, particularly cls. 4, 8 and 9 expressed an intention to enter a sale and purchase agreement and creating no liability as to that future contract.

[48] Further, the letter dated 20 August 2004 from CHW to the defendants (DBA9) informed the defendants that "other terms and conditions of the sale and purchase agreement are subject to further discussion."

[49] It is the defendants's contention that s. 4 provides that earnest deposit which was paid would be forfeited unless a sale and purchase agreement was executed within fourteen days of acceptance by the defendants, it is therefore absurd to suggest that a formal agreement would have to be executed again within fourteen days if all the terms and conditions have already been finalized in the letter of intent.

[50] For support, reliance was placed on *Ayer Hitam Tin Dredging Malaysia Bhd*, *supra*, where the Federal Court described the letter of intent as having "the characteristic of which have been described by Fay J at first instance in his judgement in *Turiff Construction Ltd and Turiff Ltd v. Regalia Knitting Mills Ltd* at p. 22 para. 3 thus - "As I understand it such a letter is no more than the expression in writing of a party's present intention to enter into a contract at a future date. Save in exceptional circumstances it can have no binding effect."

[51] Further reliance was also placed on *Lim Chia Min v. Chean Sang Ngeow & Another* [1997] 2 CLJ 337, where the Federal Court held that when parties "proposed that a formal agreement would be prepared and execute", they must mean what they say.

[52] For ease of reference, cls. 4, 8 and 9 in the draft letter of intent annex to the letter dated 7 October 2004 are reproduced as follows:

> Clause 4 (wrongly numbered as 5) Sale And Purchase Agreement: To be executed within fourteen (14) days from the date of acceptance of this offer by the Vendor, failing which the earnest deposit paid under this Offer to Purchase shall be forfeited by the Vendor.
>
> Clause 8 (wrongly numbered as 9)
>
> This Offer to Purchase shall only be effective, from the date of this Offer to Purchase is signed and accepted by the Vendor.
>
> Clause 9 (wrongly numbered as 10)
>
> Subject to other terms and conditions in the sale and purchase agreement to be agreed upon by both parties.

Clause 4 as amended by the Plaintiffs reads:

> Clause 4 Sale And Purchase Agreement: To be executed within fourteen (14) days from the date of acceptance of this offer by the Vendor. The earnest deposit paid under this offer by us shall be forfeited by the Vendor unless good reason is shown as proof of the delay. Our legal firm is Messrs M F Poon, Hiew & Associate and their address is as follows:
>
> (address of Messrs M F Poon, Hiew & Associates)
>
> Please contact them for the preparation of the Sale And Purchase Agreement, as we are ready to sign them.

[53] It will be recalled that the letter dated 7 October 2004 which accepted the plaintiffs' offer does not contain a qualifying condition that the acceptance was subject to the terms and conditions of the draft letter of intent. The defendants requested the plaintiffs to issue a letter of intent from the plaintiffs to the defendants. To my mind, the giving of the letter of intent is a merely formality as the acceptance of the plaintiffs' offer was not subject to any terms and conditions, the argument that the binding contract is subject to cls. 4, 8 and 9 of the plaintiffs' letter dated 11 October 2004 therefore holds no water.

[54] At any rate, a construction of these three clauses show that they do not negate the fact that a concluded agreement had been reached between the plaintiffs and the defendants.

[55] In respect of cl 4 which says that the sale and purchase agreement is "to be executed within fourteen (14) days from the date of acceptance of this offer by the Vendor", suffice it to say that a clause such as this cannot stop a binding contract from coming into being if the intention of the parties to enter a contract is already clear, and the court had under issue (a) made a finding that there was clear intention of the parties to enter into a binding contract.

[56] As for cl. 8 which says that "This offer to purchase shall only be effective, from the date this offer to purchase is signed and accepted by the vendor", I find this clause to be meaningless and should be ignored. I say so because the defendants had by the letter dated 7 October 2004 unconditionally accepted the plaintiffs' offer contained in the plaintiffs' letter dated 18 August 2004. In any event, an offer is effective and does not require signature or acceptance by the other party in order to be an offer.

[57] As for cl. 9 which says "Subject to other terms and conditions of the sale and purchase agreement to be agreed upon by both parties', I am mindful of the case of *Lim Chia Min* (relied on by the defendant), *supra*, where the Federal Court held that when parties "proposed that a formal agreement would be prepared and execute", they must mean what they say.

[58] I am of the view that *Lim Chia Min*'s case is distinguishable from the present case. In that case the appellant had wanted to purchase the respondent's business and so executed the letter AB1, para. 2 thereof stipulated "It is proposed that a formal agreement will be executed between us within four weeks from the date hereof. Should this agreement not be finalized by 23 October 1990, the sum of RM5,000 shall be forfeited by you."

[59] Whereas in the letter dated 7 October 2004 in the instant case, the defendants had unconditionally accepted the plaintiffs' offer, subject to no other condition.

[60] The reliance on *Aberfoyle Plantation Ltd v. Khaw Bian Che*ng [1959] 1 LNS 3 PC is also misplaced. The contract in that case was conditional upon the vendor obtaining a renewal of the even lease, whereas the defendants' acceptance of the plaintiffs' offer in this case is subject to no other conditions.

[61] Are the defendants allowed to rely on cl. 9 and say that all the terms and conditions have yet to be finalized? In answering this question, it will be helpful to refer to a dictum in *Charles Grenier* which reads:

> An agreement to make an agreement does not result in a contract. It is for the Court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the Court reaches an opposite conclusion, then there is an enforceable contract.
>
> Unless the approach we have stated is adopted, a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loop-hole and commerce would come to a virtual standstill.
>
> The law leans in favour of upholding bargains and not in striking them down willy-nilly …
>
> And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co. v. Arcos Ltd* [1932] All ER (Rep) 494, where he said:
>
> > Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being, too astute or subtle in finding defect, but, on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. The maxim, however,, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.
>
> This principle applies not only to documents drafted by laymen but also to those prepared by lawyers. See, *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] 129 CLR 99.

[62] To my understanding, cls. 4 and 9 do not point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed, and all terms and conditions of the sale and purchase

agreement to be agreed by the parties. Rather, in view of the clear and unconditional acceptance of the plaintiffs' offer and the objective aim of the transaction, they are indicative of an intention to merely formalize the agreement already concluded between the parties. Never mind that the parties have not yet expressly dealt with any of the terms related to the sale, this is because in an open contract the court will imply terms and conditions to give effect to the contract.

[63] In law, even though no formal agreement has been executed by the parties, there can still be a binding contract if, upon construction of the correspondence exchanged between the parties, find that the parties intended that there should be a concluded contract. Where necessary the court will imply terms into the contract of sale in order to give effect to it. (See: *Charles Grenier and Lau Seing Nguong*, *supra*).

[64] For the reasons stated above, my answer to issue (c) is in the negative for the defendants.

Issue (D) – Does The Plaintiffs' Letter Of Intent Dated 11 October 2004 Constitute An Offer To The Defendants To Purchase The Lands Subject To The Terms And Conditions Set Out In cls. 4, 8 And 9 Of The Plaintiffs' Letter Dated 11 October 2004?

[65] For the defendants, it is contended that the plaintiffs' letter of intent dated 11 October 2004 is a record of the parties' essential terms and conditions and their intention to enter into a formal contract at a later date and secondly, it is in effect a counter-offer with a proposal variation to an essential term. However, the parties never executed the formal sale and purchase agreement within the fourteen days period as the defendants never accepted the plaintiffs' letter of intent or counter-offer.

[66] In *Charles Grenier*, *supra*, learned counsel for the appellant in that case argued that the phrase "subject to the sale and purchase agreement" appearing in the estate's letter of 28 November 1989 shows that the parties were still negotiating. There were many terms which the parties had not agreed upon. Some of them may never be agreed upon when the draft agreement was prepared and exchanged. Upon this premise, it was argued that there was no concluded contract.

[67] In rejecting that argument, Gopal Sri Ram JCA said, thus:

> The phrase "subject to the sale and purchase agreement" relied on by counsel for the appellant do not, in our judgement, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, they are, when read in the context of the correspondence and the objective aim of the transaction - and this is how we read them - indicative of an intention to merely formalize the agreement already concluded between the parties.

[68] In *Bonnewell v. Jenkins* [1878] 8 Ch D 70, the High Court held at p. 72 that a long series of cases has established this proposition that a mere reference to a future contract is not enough to negative the existence of a present one.

[69] It can be seen from the authorities referred to above that even where the phrase "subject to contract" has been used, the law does not regard the execution of a formal agreement as something critical or "magical" to the existence of a contract, but a mere formality which does not affect the parties' legal obligations. As no such phrase was used in the defendants's letter dated 7 October 2004 which accepted the plaintiffs' offer, all the more the reference to execution of a formal sale and purchase agreement is a mere formality to a binding contract which had already been formed.

[70] Based on the reasons stated above, my answer to Issue (d) is in the negative for the defendants.

Issue (E) – If The Plaintiffs' Letter Of Intent Dated 11 October 2004 Constituted An Offer To The Defendants, Was Such Offer Accepted By The Defendants?

[71] Following my negative answer to issue (d), the answer to issue (e) must necessarily be in the negative for the defendants.

Estoppel Issue

[72] Learned counsel for the plaintiffs contended that in any event, the defendants are estopped from relying on the letter of intent because the letter was only issued by the plaintiffs to comply with the defendants's requirement for formality.

[73] Learned counsel for the defendants contended otherwise. According to them, the invitation to the court to ignore the plaintiffs' letter of intent is effectively asking the court to ignore the essential terms and conditions being negotiated by the parties

in the letter of intent, and this would be inconsistent with the plaintiffs' reliance on the case of *Charles Grenier*. Further, the plaintiffs had not regarded the draft letter of intent as a mere formality because he had considered it carefully and made variation to cl. 4 to make it more favourable to the plaintiffs.

[74] In my judgement, this is a suitable case to draw out from the armory of the law the weapon of estoppel to estoppe the defendants from relying on the plaintiffs' letter of intent. I say so for the following reasons.

[75] It is undisputed fact that the defendants had sold the lands to one Chin Foh Kui for RM1.9 million. This fact was not disclosed to the plaintiffs by the defendants and it was discovered by the plaintiffs through their own investigation.

[76] DW1 gave evidence that when CHW issued the letter dated 7 October 2004, the defendants had already received the bid from Chin Kui Foh. It is normally the policy of the defendants to accept the highest bid.

[77] DW3 claimed that Chin Kui Foh's offer was initially rejected by the defendants even though it was a higher offer (RM1.9 million) than the plaintiffs' (NOP Q188, 192, 194, 199, 200, 248 and 249), but when challenged that his story is only an afterthought (NOP Q202), the defendants failed to produce any documentary evidence to substantiate this allegation.

[78] I agree with the plaintiffs that an adverse inference should be drawn against the defendants to the effect that if the relevant documents had been disclosed to the court, there would have proved that the initial offer by Chin Kui Foh was lower than the plaintiffs' offer of RM1.6 million in the letter of offer dated 18 August 2004.

[79] The subsequent sale of the lands to Chin Kui Foh for RM1.9 million shows that the defendants had locked up the plaintiffs' offer while they went hunting for a better bargain. When they found one who was willing to pay RM300,000 more, they relied on the plaintiffs' letter of intent to get out of their legal obligation under the concluded contract between the parties.

[80] Given that all the terms which the defendants now seeks to rely on were drafted by the defendants themselves, not by the plaintiffs, it would be unconscionable, unfair, unjust and inequitable for the defendants to first induce the plaintiffs to write out the letter of intent – to obey the terms dictated by the defendants – by

giving the plaintiffs impression or belief that the defendants had agreed to a binding contract, and secondly turn around to use those very letter of intent to work against the plaintiffs.

Whether Specific Performance Ought To Be Granted

[81] The plaintiff seeks specific performance of the contract to sell the three lands at RM1.6 million.

[82] The plaintiff's evidence about its willingness and ability to perform that contract has not been challenged by the defence.

[83] The plaintiff's evidence that the three lands are uniquely valuable to the plaintiff due to their proximity to the land of the plaintiff's sister company, Emson Sdn Bhd is also unchallenged.

[84] Section 11 of the Specific Relief Act 1950 empowers the court to order specific performance of a contract when monetary compensation would be an inadequate remedy.

> (1) Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced:
>
> (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief;

[85] Section 11(2) of the Specific Relief Act 1950 clearly says that there is a presumption that in contracts for the sale of immovable property, monetary compensation cannot be an adequate remedy:

> (2) Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

[86] At trial, the defendant has not led any evidence whatsoever to rebut this assumption.

[87] Learned counsel for the defendant had also informed the court that the three lands have not been registered in the name of Chin Kui Foh.

[88] In light of the above, specific performance is an appropriate order.

Conclusion

[89] Based on the correspondence exchanged between the plaintiffs and the defendants and their conduct, I am satisfied that the plaintiff has proved his claim on the balance of probability and I find as follows:

a. That the parties have intended to enter into a binding contract when the defendants *vide* the letter dated 7 October 2004 made an unconditional acceptance of the plaintiffs' offer to buy the lands for RM1.6 million free of encumbrances and that the parties were not at negotiation stage prior to the plaintiffs' letter dated 11 October 2004;

b. That the plaintiffs' letter dated 11 October does not constitute an offer to the defendants. The issuance of the letter dated 11 October 2004 is a mere formality as there was already a concluded contract formed between the parties.

c. That the concluded contract is not subject to the plaintiffs' letter dated 11 October 2004, particularly cls. 4, 8 and 9.

d. In any event, the defendants are estopped from relying on the letter of intent.

e. For all the reasons aforesaid, I gave judgment for the plaintiff and hereby declared that there is a binding agreement between the plaintiff and the defendant for the sale and purchase of the three lands, Sandakan Country Lease Nos 075413937, 075413964 and 075413973 for the total consideration of RM1,600,000.

f. I further order for specific performance of the binding agreement.

g. Costs be to the plaintiff to be taxed unless agreed.